IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SALES TAX REFERENCE NO. 48 OF 1998

WITH

SALES TAX REFERENCE NO. 49 OF 1998

M/s.Patankar Brothers. ... Applicant.

V/s.

Commissioner of Sales Tax,
Maharashtra State, Mumbai. ... Respondent.

P.V.Surte i/b. M/s.P.V.Surte & Co.
for the Applicant.

Mrs.Madhubala Kajle, A.G.P. for the respondent.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 19th August 2005.

ORAL JUDGMENT : (Per V.C.Daga, J.)

. Both these references under section 61(1) of the Bombay Sales Tax Act, 1959 ("BST Act" for short); are at the instance of the applicants/ assessee based on the following statement of facts.

Statement of Facts :
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2. The applicants have its place of business at Jalgaon. They deal in agricultural machinery and PVC Pipes manufactured and sold by M/s.Finolex Pipes Pvt.Ltd., Pune. The applicants had purchased PVC

Pipes from M/s.Finolex Pipes Pvt.Ltd., who had recovered sales tax from the applicants @ 8%. In the assessments, M/s.Finolex was assessed at 8% by the Assistant Commissioner of Sales Tax (Assessment)- I, Pune Division, Pune. However, in the appeals filed by them against the said assessment orders, the Deputy Commissioner of Sale Tax (Appeals)-I, B.C.D., Bombay; who decided the appeals, for the period from 1st May 1982 to 30th April 1984 and from 1st May 1983 to 30th April 1984, found that the pipes manufactured and sold by them i.e. Finolex Pipes Pvt.Ltd. were taxable only at the rate of 2% being goods covered by entry C-I-18 read with entry No.117 of the notification issued under section 41 of the BST Act as such excess amount of tax @ 6% collected was liable to be forfeited. Accordingly, excess collection of sales tax made by M/s.Finolex Pipes Ltd. @ 6% was forfeited.

3. The provisions of the BST Act create right in favour of the assessee (who has paid excess amount of tax) to claim refund of the amount forfeited by the Sales Tax Department since that amount belongs to him. the applicants-assessees herein, thus, filed applications under section 38(6) of the BST Act to claim refund of the amount before the Assistant

Commissioner of Sale Tax (Assessment)-I, Pune Division ("Assistant Commissioner" for short), under whose jurisdiction M/s.Finolex Plastics Pvt.Ltd. are registered as dealers.

4. The fate of the above applications was never communicated to them by the department. The applicant finding no response from the Assistant Commissioner approached the Additional Commissioner of Sales Tax, Pune Division, Pune, who vide letter dated 20th January, 1993 informed the applicants that their applications for refund of the forfeited amount had been rejected by the Assistant Commissioner as barred by limitation. The applicants treating the said communication as an order of rejection, filed appeals before the Maharashtra Sales Tax Tribunal, Mumbai ("Tribunal" for short).

5. The Tribunal rejected these appeals, firstly, holding that the letter of communication by the Additional Commissioner could not be treated as an appellable order passed under the Act; secondly, the applicants ought to have approached proper authority, namely, Deputy Commissioner of Sales Tax (Appeals)-I, Bombay, who had passed the orders of forfeiture. In other words, according to the

Tribunal, the Assistant Commissioner was not competent officer to whom the application for refund could have been made. The Tribunal, thus, dismissed the appeals for the reasons recorded in the judgment delivered by it on 13th March, 1995.

6. Being dissatisfied with the judgment and order of the Tribunal, the applicants moved Reference Applications under section 61(1) of the BST Act before the Tribunal. The Tribunal vide its judgment and order dated 2nd May, 1998 has referred the following questions for the opinion of this Court:

(i) Whether on a true and proper interpretation of the provisions of section 38(6) of the Bombay Sales Tax Act, 1959, the Tribunal was correct in holding that the Dy.Commissioner of Sales Tax (Appeals) I, Bombay, who had passed forfeiture order, was the proper authority for the purpose of grant of refund?

(ii) Whether the period of one year runs from the date of order of forfeiture as observed by the Tribunal, or from the date of communication of the order?

(iii) Whether the Assistant Commissioner of Sales Tax (Assessment) I, Pune Division, Pune, to whom the application for refund was made justified in rejecting the application, instead of forwarding the same to the Deputy Commissioner of Sales Tax (Appeals) I, Bombay, who had passed an order of forfeiture?

Submissions :
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7. Mr.Surte, learned counsel appearing for the applicants has urged that section 38(6) of the BST Act provides that notwithstanding anything contained in the BST Act or any other law for the time being in force, where any sum collected by a person by way of tax in contravention of section 46 is forfeited to the State Government under section 37 and is recovered from him, such payment or recovery shall discharge him of the liability to refund the said sum to the person from whom it was so collected. In turn, the assessee or dealer, who has paid excess sum or part thereof, can very well claim it by way of refund from the State Government, provided an application for such refund or claim is made by him in writing in the prescribed form to the Commissioner, within one year from the date of the order of forfeiture. The word "prescribed", as has been defined under section 2(21) of the BST Act, unless the context otherwise requires, means "prescribed by rules". In exercise of powers conferred under the provisions of the BST Act, the State Government has framed rules known as "Bombay Sales Tax Rules, 1959" ("the **BST Rules** for short). Rule 52-C thereof; provides for making application for refund under subsection (6) of section 38; in

Form 35-B. The opening part of the said Form reads as under:-

[FORM 35-B]

(See rule 52C of the Bombay Sales Tax Rules, 1959)

Application for refund under sub-section (6) of section 38

To

The Sales Tax Officer,

I/We ..... M/s. ..... *having place of business at (complete address), (if any) ..... and holding R.C.No. (if any) .... dated ..... under the Bombay Sales Tax Act, 1959, do hereby apply for refund of Rs. ..... (in words) ..... being the amount collected from me the said ..... in contravention of section 46 of the Bombay Sales Tax Act, 1959, by M/s. ..... (address) ..... holders of R.C.No. ..... dated ..... under the Bombay Sales Tax Act, 1959, whose place of business is situated in your jurisdiction. The details of the collections made in contravention of section 46 are as follows:-

***** ***** *****

***** ***** *****

I enclose herewith a certificate from the said M/s. ..... of ..... in support of the above statements.

Place .....
Date .....

Signature .....
Status .....

8. Mr.Surte submits that in the entire State of Maharashtra different officers working under different regions or part of the State are entitled to forfeit the amount of tax collected in excess by the dealer in contravention of section 36 of the BST Act. If that be so, it is humanly impossible for anybody muchless any assessee or dealer to know as to which officer has forfeited the amount of tax and in whose case, unless he gets a positive reliable information from the Sales-tax Department itself.

9. Mr.Surte further submits that in most of the cases the assessees like applicants are not in a position to know the order of assessment and/or the order in appeal preferred therefrom by the assessees and consequent orders of forfeiture by the assessing or the appellate authority. Consequently, it is not possible for the assessee to move or approach that particular officer or authority, who has passed the order of forfeiture, so as to set up claim for refund of excess tax paid by him. Mr.Surte, thus, submits that it is necessary to interpret the provisions granting refund under the Act and Rules in a reasonable manner so as to make the provision workable. The workable interpretation will also

avoid hardship to the assessees or the persons like the present applicants.

10. Mr.Surte, in order to establish his point, cited the very case on hand by way of illustration. Taking the facts of this case, he pointed out that the applicants were not party to the assessment proceedings relating to M/s.Finolex Pipes Pvt.Ltd., as they are registered as dealer with the S.T.O., Jalgaon since their place of business is at Jalgaon. In the circumstances, there was no chance for these applicants to know the contents of the orders of assessment or the orders passed in appeal preferred by M/s.Finolex Pipes Pvt.Ltd., and/or consequent orders of forfeiture passed by the appellate authority in their appeals. Since the applicants were not party to the appeals, the orders passed by the appellate authority were not communicated to them. The applicants, only after getting knowledge of the orders of forfeiture, chose to prefer applications for refund to the Assistant Commissioner, Pune. According to the applicants, in their belief, it was the Assistant Commissioner, who was empowered to pass the order of refund though the order of forfeiture was confirmed by the Deputy Commissioner.

11. Mr.Surte submits that assuming that the applicants approached a wrong authority, namely, the Assistant Commissioner; then it was obligatory on the part of the said authority to forward the refund application to the concerned Deputy Commissioner of Sales Tax to pass an order of refund or, in alternative, any other legal order deciding refund applications.

12. Mr.Surte, relying on the provisions of the BST Act and Rules and the text of the of the Form 35-B (application for refund), referred to hereinabove, tried to unfold the scheme of the Act and Rules vis-a-vis refund application.

13. According to Mr.Surte, under the BST Rules, application for refund is required to be addressed to the Sales Tax Officer ("S.T.O." for short) with whom the applicant/assessee is registered as a dealer. He further submits that once the application is made to the S.T.O. in the prescribed form (i.e. Form 35-B), then it is the duty of the S.T.O. to forward it with his remarks to the Commissioner or any other authority empowered to consider the refund application. In turn, the Commissioner, is required

to process and decide such refund application. The Commissioner after processing the application, is expected to transmit it with order of refund along with refund voucher or refund cheque (as the case may be) to the very same S.T.O. from whom he had received the refund application for consideration.

14. Mr.Surte, thus, submits that the interpretation put by him on the provisions of the Act and Rules as also the scheme of refund emerging therefrom be accepted, since the legislative provision is not clear.

15. Mr.Surte with respect to the second question submits that the limitation of one year from the date of order of forfeiture contemplated under section 38(6) of the BST Act cannot be counted from the date of passing of the order of forfeiture. It has to be counted from the date of communication of the order. He submits that the applicants could not have applied for refund of the amount forfeited to the State unless the order of refund was communicated or made known to them. Thus, the expression "the date of the order" needs to be construed as from the date of communication of the order so as to avoid hardship; and to make the provision workable.

16. Mr.Surte, so far as the third question is concerned, submits that the applicant had preferred application to the Assistant Commissioner on the assumption that he was empowered to pass the order of refund. However, if the Assistant Commissioner felt that he had no jurisdiction to grant order of refund, then the said application ought to have been forwarded by him to the authority having jurisdiction to entertain such application but in no circumstance, it could have been rejected by him. If he had no authority to consider the application, then he had no authority or jurisdiction to reject it.

17. Mr.Surte, thus, at the cost of repetition, submitted that it would be reasonable to lay down workable procedure for refund which is absent in the Act and Rules.

Per Contra :
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18. At the outset, Mrs.Kajle, learned A.G.P. appearing for the Revenue raised a preliminary objection to the maintainability of this reference. In her submission, appeal before the Sales Tax Tribunal was preferred against the reply given by the

department to the letter of the applicants which was administrative in nature. It was not a statutory order under the BST Act. In her submission, while deciding Appeal Nos.26 and 27 of 1993, it was so held by the Tribunal vide its order dated 13th March, 1995. It is, thus, urged that the Tribunal could not have entertained prayer of the applicants for reference and could not have referred questions of law to this Court for opinion. Consequently, submission is that the reference under section 61(1) itself being bad and illegal, this Court should not answer the questions referred by the Tribunal.

19. The learned A.G.P. on merits submitted that as per sub-section (5) of section 20 the Deputy Commissioner is entitled to exercise, in the area falling within his jurisdiction, all the powers and perform all the duties, conferred or imposed on the Commissioner by or under the BST Act. Sub-sections (2) and (3) of section 37 give power to the Commissioner. The power to forfeit an excess collection of tax in the course of any proceeding under the BST Act is given to the Commissioner under sub-sections (2) and (3) of section 37. The same powers can be exercised by the Deputy Commissioner. In her submission, as per rule 48 of the BST Rules;

when the Commissioner is satisfied that a refund is due; he is required to record reasons in the order showing the amount of refund due and is further required to communicate the same to the dealer. According to the learned A.G.P., the conjoint reading of section 20(5); section 37(2) and (3) and rule 48 makes it clear that the Deputy Commissioner (Appeals) has powers to pass order of forfeiture and, if applied to him in prescribed format in Form - 35(B), he has further power to grant refund. It is, thus, urged that the application made by the applicant to the Assistant Commissioner was not maintainable and it was rightly rejected.

20. So far as the period of limitation is concerned, Mrs.Kajle submits that the refund of forfeited amount can be claimed from the Government by the person from whom it was realised by way of tax, provided that an application for such claim was made by him in writing in the prescribed form to the Commissioner, within one year from the date of the order of forfeiture. According to Mrs.Kajle, learned A.G.P. on receipt of any such application, the Commissioner has to hold an inquiry as he deems fit, and if the Commissioner is satisfied that the claim is valid and admissible and that the amount so

claimed as refund was actually paid in Government treasury or recovered, and no drawback, set-off, refund or remission in respect of that amount was granted, then he has to refund that sum or part thereof found to be due and payable to the person concerned. It is, thus, urged that the period of limitation runs from the date of the order of forfeiture and not from the date of its knowledge or communication.

21. So far as third question is concerned, in reply, learned A.G.P. submits that the said question having become academic, it need not be answered.

Statutory Provisions :
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22. Before considering the rival contentions, it would be useful to refer to the statutory provisions having impact on the questions involved. Section 20(5) and section 37(2) & (3) and section 38(6) of the BST Act as it stood in the relevant period read as under:

20. Sales Tax Authorities.

(1) ....
(2) ....
(3) ....

(4) ....

(5) A Deputy Commissioner shall save as other wise directed by the State Government, have and exercise in the area within his jurisdiction all the powers, and shall perform all the duties, conferred or imposed on the Commissioner by or under this Act. ...."

37. Imposition of penalty for contravening certain provisions.

(1) ....

(2) If the Commissioner in the course of any proceeding under this Act or otherwise, has reason to believe that any person has become liable to a penalty or forfeiture or both penalty and forfeiture or any sum under sub-section (1), he shall serve such person a notice in the prescribed form requiring him on a date and at a place specified in the notice to attend and show cause why a penalty or forfeiture or both penalty and forfeiture of any sum as provided in sub-section (1) should not be imposed on him.

(3) The Commissioner shall thereupon hold an inquiry and shall make such order as he thinks fit. ...."

38. Payment of tax, and deferred payment of tax, etc.

....

(6) Notwithstanding anything contained in this Act or in any other law for the time being in force, where any sum collected by a person by way of tax in contravention of section 46, is forfeited to the State Government under section 37 and is recovered from him, such payment or recovery shall discharge him of the liability to refund the sum to the person from whom it was so collected. A refund of such sum or any part thereof can be claimed from Government by the person from whom it was realised by way of tax, provided that

> an application for such claim is made by him in writing in the prescribed form to the Commissioner, within one year from the date of the order of forfeiture. On receipt of any such application, the Commissioner shall hold such inquiry as he deems fit, and if the Commissioner is satisfied that the claim is valid and admissible and that the amount so claimed as refund was actually paid in Government treasury or recovered, and no draw-back, set-off, refund or remission in respect of that amount was granted, he shall refund the sum or any part thereof, which is found due to the person concerned.

Rule 48 and rule 52-C of the BST Rules read as under:

> **48. Order sanctioning refund.**
> . When the Commissioner is satisfied that a refund is due, he shall record an order showing the amount of refund due and shall communicate the same to the dealer.
>
> **52-C. Refund under sub-section (6) of section 38.**
> . An application for refund under sub-section (6) of section 38 shall be made in Form 35-B.

Consideration :
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23. Having heard rival parties; having examined the statutory provisions and the scheme of the BST Act referred to hereinabove, it is clear that any sum collected by a person by way of tax in contravention of section 46, is required to be forfeited to the State Government under section 37(2) of the BST Act and is required to be recovered from

him, such payment or recovery gives him discharge from the liability to refund the said sum to the persons from whom it was so collected. However, it is not open for the State to retain the amount so forfeited. The refund of such sum or any part thereof can be claimed from the Government by the person from whom it was realised by way of tax, provided such claim is made by him in a prescribed form to the Commissioner within one year from the date of the order of forfeiture. On receipt of any such application, the Commissioner has to hold enquiry as he deems fit, and, has to be satisfied that the claim made is valid and admissible and the amount so claimed as refund was actually paid in government treasury or recovered, and no draw-back, set-off, refund or remission in respect of that amount was granted. He, upon his satisfaction, has to grant refund of the sum or any part thereof found to be due to the person concerned.

24. On the canvas of the above statutory provisions; twin issues need consideration, firstly, as to the mode and manner of making application for refund and, secondly, determination of starting point of limitation for moving application for refund.

As to Question No.1 :
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25. So far as first question is concerned, section 38(6) of the BST Act requires applicant to apply for refund in writing in the prescribed form to the Commissioner. If one turns to the prescribed form i.e. Form 35-B application is required to be addressed to the S.T.O. Thus, the position of the Act and the Rules do not go hand in hand. Both provisions are at variance. As rightly submitted by Mr.Surte, no applicant or dealer or a person claiming refund is expected to move through out the State to claim amount of refund under section 38(6). It is therefore, necessary to reconcile the provisions of the Act and Rules so as to make them workable.

26. It is the settled principle of interpretation that the statute must be construed to make it effective and workable. The courts strongly lean against a construction which reduces the statute to a futility or which creates hardship while implementing its provisions. A statute or any enacting provision therein must be so construed as to make it effective and operative. The approach of the courts should be to secure the object which the statute seeks to achieve unless crucial omission or

clear direction in the statute makes it unattainable. Therefore, it is said that if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, then the Courts should avoid a construction which would reduce the legislation to futility and should rather accept the broader construction, based on the view that the legislature legislates only for the purpose of bringing about an effective result. The courts may complain that the enactment is mind twisting or an enigma; yet they do not readily concede that no meaning can be given to it and to their committee with the legislature, they strive hard to give meaningful life to legislative enactments.

27. In our view, the legislative intent appears that every claim for refund under section 38(6) is expected to be first moved to the S.T.O., who has assessed and recovered sales tax from the applicant. The S.T.O., after receipt of the application, is expected to forward it to the Commissioner as contemplated under sub-section (6) of section 38 of the BST Act with his remarks along with necessary documents. Then, after receipt of refund application with remarks of the S.T.O., the duty of the

Commissioner starts. He is obliged to conduct enquiry as he deems fit and pass an order either granting or refusing to grant refund. Thereafter, he is expected to remit that order to the S.T.O., who in turn, is expected to communicate that order to the applicant, if it is adverse to him. If it is an order granting refund, then the S.T.O. is expected to forward it to the applicant along with refund voucher or cheque. Thus, it is not necessary for the applicant (assessee/dealer) claiming refund to approach the authority, who has passed the order of forfeiture. He is not expected to run from one corner to other of the State to claim refund of amount of tax collected in excess from him.

28. Having spelt out the contours of the refund scheme, the Assistant Commissioner, to whom the applications were made, was neither justified in rejecting the said applications nor was he right in forwarding it to the Deputy Commissioner of Sales Tax (Appeals) for decision, who had passed orders of forfeiture. The applications ought to have been moved by the applicants to the S.T.O. with whom they were registered as dealer. The S.T.O., in turn, could have forwarded their applications for refund to the Commissioner. The Commissioner could have made

necessary enquiry and passed appropriate orders and transmitted it to the concerned S.T.O., either granting or refusing to grant refund. We accordingly, answer question No.1 in the negative i.e. against the Revenue.

As to Question No.2 :
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29. So far as the second question with regard to the commencement of the period of limitation for moving refund application is concerned, one can safely answer the same on the basis of law laid down by the Apex Court in the case of **D.Saibaba v. Bar Council of India**, (2003) 6 SCC 186, wherein the words "the date of that order" were the subject matter of judicial scrutiny. In that case, the view canvassed by the Bar Council of India was that the limitation starts running from the date of the order and not from the date of its communication. Per contra, the submission of the review petitioner, in that case, was that unless the order was communicated to the concerned person limitation could not be allowed to start running against him. The aggrieved person cannot avail remedy available in law unless the order is communicated to him. It was, thus, urged that the expression "the date of that order" needs to be

construed to mean the date of communication of the order. This submission found favour with the Apex Court. The Apex Court, taking survey of its earlier judgments as also that of various High Courts, ruled as under:

> " So far as the commencement of the period of limitation for filing the review petition is concerned the expression "the date of that order" as occurring in Section 48-AA has to be construed as meaning the date of communication or knowledge of the order to the review petitioner. Where the law provides a remedy to a person, the provision has to be so construed in case of ambiguity as to make the availing of the remedy practical and the ;exercise of power conferred on the authority meaningful and effective. A construction which would render the provision nugatory ought to be avoided."

30. An identical point was for consideration before the Apex court in the case of **Raja Harish Chandra Raj Singh v. Dy.Land Acquisition Officer**, AIR 1961 SC 1500 : (1962) 1 SCR 676. Section 18 of the Land Acquisition Act, 1894 requires that an application seeking reference to the Court should be filed within six months from the date of the Collector's award. While interpreting section 18, the Apex Court held that "the date of the award" cannot be determined solely by reference to the time when the award was signed by the Collector or

delivered by him in his office. The Apex Court said, it must involve the consideration of the question as to when it was made known to the party concerned either actually or constructively. If that be the true position, then placing a literal and mechanical construction on the words "the date of the award" occurring in the relevant section would not be appropriate. It is fair and just that a decision is communicated to the party whose rights will ultimately be affected or who will be affected by the decision. The knowledge, either actual or constructive, to the party affected by such a decision, is an essential element which must be satisfied before the decision can be brought into force. Thus, Apex Court construed that the making of the award cannot consist merely of the physical act of writing an award or signing it or even filing in the office of the Collector; it must involve the communication of the said award to the party concerned either actually or constructively. The view taken in the case of **Raja Harish Chandra** by two Judges Bench of the Apex Court was further affirmed by its three Judges Bench in the case of **State of Punjab v. Qaisar Jehan Begum**, AIR 1963 SC 1604 : (1964) 1 SCR 971. The three Judges Bench further added that the knowledge of the award does not mean a

mere knowledge of the fact that an award has been made; the knowledge must relate to the essential contents of the award. Thus, relying on the law laid down by the Apex Court, the limitation for moving an application for claiming refund under section 38(6), in our view, must start running from the date of communication or knowledge of the order by the concerned party either actually or constructively. The knowledge of the order does not mean a mere knowledge of the fact that the order was passed but the knowledge must relate to the essential contents of the order. Question No.2 stands answered accordingly.

As to Question No.3 :
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31. So far as question No.3 is concerned, the submissions made by Mr.Surte in para 16 (supra) deserve acceptance. As already discussed hereinabove and the workable interpretation given by us to the relevant provision, we are of the considered view that the applications for refund could not have been rejected by the Assistant Commissioner. The Assistant Commissioner ought to have forwarded it to the S.T.O. with whom the applicants were registered as dealer or by whom they were assessed and ought to

have directed him to process the refund applications as indicated herein. Accordingly, question No.3 stands answered in favour of the assessee and against the Revenue.

32. Both references, accordingly, stand disposed of with no order as to costs.

(J.P.DEVADHAR, J.) **(V.C.DAGA, J.)**